

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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**JUSTON JOHNSON**

Petitioner,

**Index #819000-2018**

vs.

**WEST SENECA SCHOOL DISTRICT, NEW  
YORK STATE PUBLIC HIGH SCHOOL  
ATHLETIC ASSOCIATION, SECTION 6, and THE  
NEW YORK STATE PUBLIC HIGH SCHOOL  
ATHLETIC ASSOCIATION, INC.**

Respondents.

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Carney & Carney  
Ryan S. Carney, Esq.  
*Attorney for the Petitioner, JUSTON JOHNSON*

Renee L. James, Esq.  
*Attorney for Respondents NEW YORK STATE PUBLIC HIGH SCHOOL  
ATHLETIC ASSOCIATION, SECTION 6, and THE NEW YORK  
STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC.*

Hodgson Russ LLP  
Andrew Freedman, Esq. & Joseph S. Brown, Esq.  
*Attorneys for Respondent West Seneca Central School District*

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## **DECISION & JUDGMENT**

Pending before the court is an Article 78 proceeding seeking to set aside Respondents' determination refusing to grant Petitioner an extra year of eligibility to play high school basketball during the 2018-2019 season. The matter came on by order to show cause signed on December 5, 2018. The court heard oral argument on

December 12, 2018.<sup>1</sup>

By way of background, the Petitioner, JUSTON JOHNSON, is currently a high school senior at West Seneca West High School. He began playing basketball at the high school level in 2012-2013 when he was still in seventh grade.

Under regulations of the New York State Public High School Athletic Association (hereinafter, "Athletic Association"), students are generally permitted four years of eligibility to play high school sports, but that window is extended by two years if the student begins playing in seventh grade (one additional year if the student starts in eighth grade).

Because he started playing at the high school level in seventh grade, Mr. Johnson was deemed eligible to play high school basketball for six consecutive seasons (whether he played or not), meaning his last year of eligibility was the 2017-2018 season. At that point, Mr. Johnson would normally have been a high school senior and would have been looking forward to attending college the next year, *i.e.*, for

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<sup>1</sup> In reaching a decision this Court has reviewed and considered the following papers:

- Petitioner's Amended Order to Show Cause, granted on December 5, 2018;
- Amended Petition dated November 30, 2018, with exhibits;
- Amended Affirmation of Ryan S. Carney, Esq., dated November 30, 2018;
- Affirmation of Renee L. James, Esq., dated December 10, 2018;
- Affidavit of Robert Zayas, sworn to December 10, 2018;
- Affidavit of Timm Slade, sworn to December 10, 2018;
- Answer by West Seneca Central School District;
- Reply Affirmation of Ryan S. Carney, Esq., dated December 11, 2018, with exhibits
- Petitioner's post-hearing submission of December 14, 2018

the current 2018-2019 season.

Mr. Johnson is a senior this year because he repeated the eighth grade academic year. The issue for the Athletic Association was whether the application by West Seneca High School demonstrated that Mr. Johnson's extra year of schooling (*i.e.* the repeat of eighth grade) was caused by an arm fracture that occurred on August 29, 2013, shortly before his eighth grade school year was set to begin. Mr. Johnson was kept out of public school for that entire year by his parents, who determined that their son was not physically capable of attending public school. Instead, they determined that he should be home schooled for eighth grade. Under the Athletic Association's rules, that year nonetheless counts as one of his six years of eligibility.

When Mr. Johnson returned to public school for what would have been ninth grade, he had four years left of eligibility—again, regardless of whether he played or not. Upon his return to school, he was told that he would have to repeat the eighth grade academic year, because there was insufficient documentation concerning his year of home schooling. During his second year of eighth grade (in 2014-2015), Mr. Johnson attended public school and did participate in basketball during that season. At the end of that year, he thus had only three more seasons of eligibility remaining, meaning his high school basketball career would be over as of his junior year of high school.

The following year, when Mr. Johnson was in ninth grade, he attended Bishop Timon High School and played there for ninth and tenth grades. Private schools are not governed by the rules for Section VI.

In eleventh grade (2017-2018), Mr. Johnson's older brother, who had been a coach at Bishop Timon High School, began coaching at West Seneca West High School. Mr. Johnson then transferred from Timon back to West Seneca West High School. Mr. Johnson by this point was in his last remaining year of eligibility. He played for West Seneca West High School during eleventh grade and proved to be a star athlete, helping his team greatly improve its record from prior years and advance to the sectional titles.

Had Mr. Johnson not been required to repeat eighth grade due to the insufficiency of the home schooling, Mr. Johnson would have been a senior during the 2017-2018 season. Presumably he would have been able to graduate in June, 2018 and would have been recruited by college teams and likely would have been playing for one of them this year.

At the beginning of his twelfth academic grade year, (2018), West Seneca West High School sought to obtain permission for Mr. Johnson to play another year. The application to the New York State Public High School Athletic Association noted that Mr. Johnson had sustained a fracture of his arm just before the eighth grade school year began in 2013. The regulations of the Commissioner contain an exception permitting students to extend their eligibility for an extra year if the student demonstrates that an injury prevented play during one of the years and if the student demonstrates he was required to extend his schooling as a result of that physical injury.

## **The Governing Regulations**

### **A. Duration of Competition Rule**

The New York State Commissioner of Education is authorized to establish rules governing high school sports. The rule governing “physical education” is set forth in some 16 pages at 8 NYCRR 135.4. An important component of these rules applicable to this case is the one titled “Duration of Competition” which is set forth at 8 NYCRR 135.4[c][7][ii][b][1].

The overarching objective of the “Duration of Competition” rule is to generally limit students to four consecutive years of high school sports, starting with ninth grade. If, however, the board of education of the school district allows seventh and eighth graders to participate in high school sports, then the window is five years for a student who started playing in eighth grade, and the window is six years for a student who started in seventh grade.

In all cases, however, the window is time-limited to “consecutive” years, beginning with the first year the student participates. Sitting out a year or repeating a grade does not extend the window. See, e.g., *Matter of Pratt v. New York State Pub. High Sch. Athletic Assn.*, 133 Misc.2d 679 (Sup. Ct. Nassau Co. 1986) (student who repeated ninth grade due to low academic performance level and did not play during tenth grade nonetheless maxed out his eligibility in eleventh grade); *Matter of Johnson v. Section V of New York State Pub High Sch. Athletic Assn.*, 42 Misc.3d 1204(A) Sup. Ct. Monroe Co., 2013) (student’s parents had her voluntarily retake eighth grade); *Guy v. New York State Pub. High Sch. Athletic Assn., Inc.*, 9 Misc.3d 1116(A) (Sup. Ct.

Onondaga Co., 2005) (student who was home schooled for ninth grade forfeited that year's eligibility).

The Duration of Competition rule is "designed to avoid unequal competition and in particular to avoid injuries to younger children." *Pratt v. New York State Pub. High Sch. Athletic Assn.*, 133 Misc.2d at 683.

Mr. Johnson had a six-year window, because he started playing in seventh grade. The six-year window, however, is not extended because the student skips a year. The limit of eligibility is still six consecutive years measured from the year the student started.

**B. Medical Exception to Duration of Competition Rule**

The regulations do contain a limited exception for illness or accidents. Eligibility may be extended if there is "sufficient evidence" to show that the pupil's failure to enter competition during one or more seasons of a sport was caused by "illness" or "accident". To be "sufficient" the evidence must demonstrate three criteria:

(A) the pupil's failure to enter competition during one or more seasons of a sport was caused by illness, accident, documented social/emotional condition or documented social/emotional circumstances beyond the control of the pupil; and,

(B) as a direct result of such circumstances the pupil is required to attend school for one or more additional semesters in order to graduate; and

(C) such participation would not have a significant adverse effect upon the opportunity of other pupils to participate successfully in interschool competition in the sport.

8 NYCRR 135.4[c][7][ii][b][1].

As noted in prior cases, it is thus not enough for a student to show that he could not play sports due to illness or injury. Rather, the student must also demonstrate that he is required to extend high school for one or more additional semesters because of the injury, and not because of some other reason, such as repeating a grade for academic reasons.

**The Determination Sought to be Reviewed**

By letter dated September 19, 2018, the Executive Director of Section VI notified Mr. Johnson's father that the application for an extension of the Duration of Competition rule was denied. The basis of the decision was that the six-year window began in 2012-2013 and expired at the end of the sixth year in 2017-2018.

The letter notified the student of his right to appeal to the Section VI Executive Committee. An appeal was taken to the Executive Committee, which sustained the determination. From there an appeal was taken to the New York State Public High School Athletic Association (NYSPHSAA). On November 8, 2018, the Appeal Panel also denied the appeal.

In its six-page Decision, the NYSPHSAA found that the application by the West Seneca School District to extend the student's eligibility "failed to submit sufficient evidence of an accident that prevented him from entering competition in 2013-2014, inasmuch as the cast (on his arm ) was removed in October of that season. The Appeal Panel further rejected the claim that the year of home schooling was necessitated by the injury.

**Medical Proof**

The medical evidence before the administrative body was extremely sparse. There was a single medical report from UBMD Orthopedics. The one-page report stated that UBMD ceased treating the student for his arm fracture as of October 30, 2013. The report does not state that the student was unable to attend public school during 2013-2014. The report does not in any way suggest that the student's fractured arm caused him to repeat eighth grade. The report also does not state that the student would have been unable to play sports that entire year due to the injury. Rather, the report simply states that Juston's participation in fall and winter sports was highly doubtful "due to the patient's age and physical stature".

The report does not say that a year of home schooling was necessary. Rather, the report says "the patient's academic and educational experience was altered and effected [sic] by the injury." It went on to state: "The incapability to use his writing hand would cause an abnormal and psychologically challenging learning experience in a traditional classroom setting." These statements do not lead to a conclusion that the student was incapable of being in school for the entire year.

Finally, there was no evidence in the record to suggest that the arm fracture was the cause of the home schooling being inadequate. Respondents therefore found that the applicant had not submitted sufficient proof to demonstrate that Mr. Johnson had to repeat a grade as a result of an injury.



**Application for Injunctive Relief**

The ultimate issue before the court is whether the respondents' determination should be set aside as "arbitrary" "capricious" or an "abuse of discretion". *Matter of Pell v. Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974).

The petitioner has asked the court to issue a preliminary injunction pending a final ruling. The three criteria for a preliminary injunction are: likelihood of success on the merits; irreparable injury; and a balance of equities. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *Terrell v. Terrell*, 279 A.D.2d 301 (1<sup>st</sup> Dept. 2001).

The court agrees with Mr. Johnson's position that he would be irreparably injured were the stay to be denied and it was later determined that he should have been allowed to play this season. Time is the one thing in life that cannot be recaptured.

The court also notes the strong support Mr. Johnson received from his teammates and the students at his school. These young people signed letters expressing their willingness to risk having all their games forfeited if a temporary stay were ultimately overturned. This type of dedication and solidarity speaks well of both Mr. Johnson and his teammates.

Unfortunately, Mr. Johnson is unable to demonstrate a likelihood of success on the merits and, to the contrary, the court has before it a complete record that permits a final ruling at this time.

**Legal Standard on Article 78 Proceedings**

In an Article 78 proceeding, the task before the court is an extremely limited one. The court does not have the legal authority to make its own determination of the facts nor does the court have the power to substitute its judgment for that of the administrative body. Nor does the court have the power to change the rules.

Rather, the task before the court is to examine whether the administrative body had a rational basis for its interpretation of its rules. Court intervention is limited to deciding whether the determination under review was “arbitrary” “capricious” or an “abuse of discretion”.

“The courts should not interfere with the internal affairs, proceedings, rules and orders of a high school athletic association unless there is evidence of acts which are arbitrary, capricious or an abuse of discretion”. *Matter of Caso v. New York State Pub. High Sch. Athletic Assn.*, 78 A.D.2d 41 (4<sup>th</sup> Dept. 1980); *Matter of Gerard v. Section III of N.Y. State Pub. High Sch. Athletic Assn.*, 210 A.D.2d 938, 939 (4<sup>th</sup> Dept. 1994).

“Whether the acts are arbitrary and capricious ‘relates to whether . . . the committees’ actions have a sound basis in reason and have a foundation in fact . . . The test is whether there is a rational basis.” *Matter of Pena v. New York State Pub. High Sch. Athletic Assn.*, 118 A.D.3d 1456 (4<sup>th</sup> Dept. 2014), *quoting Matter of Gerard*, 210 A.D.2d at 939.

In an Article 78 proceeding, the court is not permitted to substitute its own judgment or make its own finding of fact. *Matter of Nehorayoff v. Mills*, 95 N.Y.2d 671 (2001).

The legislature has vested decision-making power over these types of disputes with the agencies who make the regulations. A declaration of ineligibility “in violation of its own rules would subject that action to judicial scrutiny”. *Matter of Caso*, 78 A.D.2d at 48-49. However, a high school athletic association has statutory to interpret the rules and its interpretation must be accorded great deference. *Suburban Scholastic Athletic Council v. Section II of the NYSPHSAA*, 23 A.D.3d 728, 730 (3<sup>rd</sup> Dept. 2005).

Where there is proof to support the determination that was made, the agency's determination must be upheld. Courts thus have a limited role in these kinds of cases.

#### **Application of Law to the Facts**

In the subject case, the Respondents found that there was insufficient proof to establish that Mr. Johnson's injury actually prevented him from playing basketball during the 2013-2014 season. As noted, the single medical report submitted with the application did not state he was unable to participate in sports after October 30, 2013.

More importantly, however, the record is totally devoid of proof that the injury caused him to repeat eighth grade.

It was agreed by all involved that the extra year of high school was caused by deficiencies in the year of home schooling. There was nothing to connect the broken arm to those deficiencies. Rather, the year of home schooling did not meet academic requirements. There is no proof in the record, therefore, that the arm fracture caused Mr. Johnson to be held back a grade.

The regulation at issue sets forth a “two-pronged test for extended eligibility in the case of injury or illness”. *Appeal of N.M., Sr.*, 55 Ed. Dept. Rep., Decision No.

16,846. The student must demonstrate, first, that he was unable to participate in the subject sport due to illness or injury; and “(2) the injury or illness which caused the student to not enter competition must have also caused the student to require additional time to graduate”. *Id.*

The reason for Mr. Johnson repeating eighth grade, and thus needing more than four years to graduate high school, was due to lack of documentation of academic performance during home schooling. Where a student repeats a grade for academic reasons, the student does not meet the limited exception for an extended year of eligibility under the rule quoted above. See, e.g., *Matter of Johnson v. Section V of the New York State Public High School Athletic Assn.*, 42 Misc.3d 1204(A) (Sup. Ct. Monroe Co., 2013) (student repeated eighth grade for academic reasons at her parents' request; eligibility ended in her junior year of high school).

This finding by the Respondents in this case is thus amply supported by the record and cannot be deemed arbitrary or capricious. To the contrary, courts have noted that the Commissioner's Duration of competition rule was enacted expressly to prevent the practice colloquially known as “red shirting”:

whereby a high school student is held back for one grade for academic reasons and does not compete in athletics for that school year. The student then competes in his fifth year in high school, when he is more mature, physically developed and presumably more proficient. This practice is undesirable in considerable part because it provides a vehicle whereby the older “red shirted” student is competing with younger, less developed students, a situation which could lead to injuries.

*Pratt v. New York State Pub. High Sch. Athletic Ass.*, 133 Misc.2d at 682-684, citing

*Murtagh v Nyquist*, 78 Misc.2d 876 (Sup Ct. Sullivan Co, 1974).

Numerous past decisions of the Athletic Association, as cited herein, have rejected efforts by high school athletes to gain an additional year of eligibility. In the subject case the record contained extremely limited medical evidence, and the one letter that was supplied merely stated that there was a fracture that was medically treated up to the end of October, 2013. Even assuming that Mr. Johnson would have been unable to play basketball that year (eighth grade), the record has no proof to show that he would have been unable to meet his academic requirements for that year, had he stayed in school.

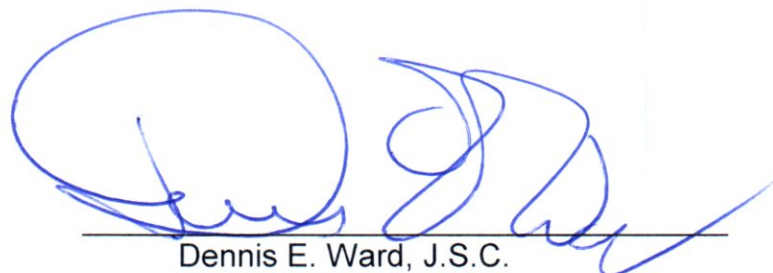
Allowing a student to be out of school for an entire year, during which he presumably gets bigger and stronger, is exactly the situation the "Duration of Competition" regulations seek to avoid. Had Mr. Johnson stayed in public school for eighth grade, and even if he had been entirely unable to participate in sports that year, presumably he would have continued with his academic education and been able to pass eighth grade. Had he done so, he would have been able to graduate high school on time this past year when he was, by all accounts, a star player. That the respondents did not give him a further year of eligibility after that cannot be deemed to be an arbitrary or capricious application of their rules, nor was it an abuse of discretion under the facts presented to them.

The parties at oral argument were given the opportunity to submit further legal arguments, and the petitioner's counsel availed himself of that opportunity. The parties otherwise agreed the case is ripe for a decision on the merits.

The court therefore makes a final ruling that the respondents' determination is sustained. The request for injunctive relief is denied, and the Article 78 petition is dismissed.

The foregoing shall constitute the final Judgment of the Court.

DATED: December 17, 2018

  
Dennis E. Ward, J.S.C.

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